Supreme Court, U.S.
FILED
07-516 OCT 16 2007
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

SUSAN KNOX, a Chief Deputy District Attorney working for the 19th Judicial District Attorney's Office, in her individual capacity,

Petitioner,

v.

THOMAS MINK; THE HOWLING PIG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID R. BROUGHAM
Counsel of Record
ANDREW D. RINGEL
HALL & EVANS, L.L.C.
1125 17th Street, Suite 600
Denver, CO 80202-2052
(303) 628-3300

Attorneys for Petitioner

211659

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Is a prosecutor entitled to absolute immunity from a 42 U.S.C. § 1983 claim based on her review of a search warrant for sufficiency of probable cause pursuant to a specific state statute requiring her to do so before the search warrant's presentation to a judge by the police?

LIST OF PARTIES TO THE PROCEEDING

1. Susan Knox, petitioner

2. Thomas Mink, respondent

3. The Howling Pig, respondent

John W. Suthers and Kenneth R. Buck , defendants below, have no interest in this proceeding. The other entities in the caption at the Tenth Circuit were amici.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties to the Proceeding	ii
Table of Contents	iii
Table of Appendices	v
Table of Cited Authorities	vi
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	5
Reasons for Granting the Petition	10
I. The United States Court Of Appeals For The Tenth Circuit's Decision Fails To Follow Decisions From The Court	10

Contents

Page

A. The Court of Appeals Decision Conflicts With Precedent from the Court in Concluding Chief Deputy District Attorney Knox's Review and Approval of the Search Warrant for its Probable Cause Sufficiency Was Not Undertaken in her Advocacy Role as an Officer of the Court 11

II. The Proceeding Involves A Question Of Exceptional Importance, In That The Result, If Undisturbed, Will Lead To Significant Disruption For Prosecutors Throughout The United States For Defending Claims Pursuant To 42 U.S.C. § 1983 Because The Tenth Circuit's Decision Represents A Significant Erosion In The Protections Afforded By Absolute Immunity 22

Conclusion 24

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Tenth Circuit Filed April 16, 2007 ..... 1a

Appendix B — Memorandum Order And Opinion Of The United States District Court For The District Of Colorado Dated And Filed October 26, 2004 ..... 39a

Appendix C — Order Of The United States Court Of Appeals For The Tenth Circuit Denying Petition For Rehearing Filed July 19, 2007 .. 59a

TABLE OF CITED AUTHORITIES

Page

Cases:

Antoine v. Byers & Anderson, Inc.,
508 U.S. 429 (1993) 11

Buckley v. Fitzsimmons,
509 U.S. 259 (1993) 13

Burns v. Reed,
500 U.S. 478 (1991) 11, 12, 13, 17

Cleavinger v. Saxner,
474 U.S. 193 (1985) 11

Forrester v. White,
484 U.S. 219 (1988) 11

Imbler v. Pachtman,
424 U.S. 409 (1976) ..... *passim*

Johnson v. Rex,
474 U.S. 967 (1985) 21

Kalina v. Fletcher,
522 U.S. 118 (1997) ..... *passim*

Stump v. Sparkman,
435 U.S. 349 (1978) 12

Cited Authorities

Page

STATUTES

C.R.S. § 18-13-105 ..... 2, 5

C.R.S. § 20-1-106.1 ..... 3, 5, 20, 21, 22

18 U.S.C. § 2703 6

28 U.S.C. § 1254 1

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 2000aa 5-6

OPINIONS BELOW

The decision of the United States Court of Appeals has been published at 482 F.2d 1244. App. 1a. The decision of the United States District Court for the District of Colorado has been published at 344 F. Supp.2d 1231. App. 39a.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was issued on April 16, 2007. App. 1a. Respondents Thomas Mink and *The Howling Pig* filed a Motion for Extension of Time to File Petition for Rehearing on April 26, 2007, which was granted by the Tenth Circuit on April 27, 2007. On May 13, 2007, Respondents filed a Petition for Panel Rehearing or Rehearing En Banc. The United States Court of Appeals denied the Petition for Panel Rehearing or Rehearing En Banc in an Order dated July 19, 2007. App. 59a. The Court has jurisdiction to entertain this petition for certiorari pursuant to the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves 42 U.S.C. § 1983:

Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This case also involves Colorado's criminal libel statute, C.R.S. § 18-13-105:

Criminal libel

> (1) A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel.

(2) It shall be an affirmative defense that the publication was true, except libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living.

(3) Criminal libel is a class 6 felony.

This case also involves a Colorado statute regarding review by a district attorney of search warrant affidavits, C.R.S. § 20-1-106.1:

Preparation and review of affidavits and warrants

(1) The district attorneys of the several judicial districts in the state of Colorado shall:

(a) Render, in their quasi-judicial capacity, legal advice to peace officers, upon the request of such officers or of the court, pertaining to the preparation and review of affidavits and warrants for arrests, searches, seizures, nontestimonial identification items, and court orders for the production of records;

(b) Examine and evaluate each affidavit for a no-knock search warrant sought pursuant to part 3 of article 3 of title 16, C.R.S., and render legal advice regarding such affidavit to the peace officer submitting the affidavit before such affidavit is submitted to a judge. A district attorney, including any assistant

district attorney, chief deputy district attorney, or deputy district attorney, shall indicate approval of an affidavit by placing the date and his or her signature and attorney registration number on the affidavit as allowed by statute or court rule. A district attorney shall only sign an affidavit for a no-knock search warrant sought pursuant to part 3 of article 3 of title 16, C.R.S. upon satisfaction that the information in such affidavit;

(I) Fulfills the requirements of section 16-3-303, C.R.S.; and

(II) Supports the lawful issuance of a search warrant pursuant to section 16-3-301, C.R.S.

(2) In the absence of the bad faith performance of the duties specific in this section, the district attorneys of the state of Colorado shall be immune from liability for the performance of said duties; except that such immunity shall not apply to charges of perjury in the first degree, perjury in the second degree, or false swearing brought pursuant to section 18-8-502, 18-8-503, or 18-8-504, C.R.S., respectively.

(3) The division of criminal justice within the Colorado department of public safety shall review existing policies relating to the issuance and use of no-knock search warrants pursuant to section 24-33.5-503(1)(q), C.R.S.

STATEMENT OF THE CASE

Thomas Mink was a student at the University of Northern Colorado ("UNC"). Mr. Mink published an internet-based journal called *The Howling Pig*. Several issues of *The Howling Pig* included Mr. Mink's column under the pen name "Jun' ıs Puke," which parodied the views of an actual UNC professor named Junius Peake. Professor Peake complained to the Greeley Police Department who initiated an investigation of Mr. Mink for potential violations of Colorado's criminal libel statute, C.R.S. § 18-13-105.

The Greeley Police Department sought a search warrant to search Mr. Mink's home. Pursuant to the procedures of Colorado law, a police detective prepared a search warrant affidavit and submitted the affidavit to the office of the district attorney for legal review pursuant to C.R.S. § 20-1-106.1. Chief Deputy District Attorney Susan Knox reviewed and approved the search warrant affidavit for its sufficiency for probable cause. The search warrant affidavit was then presented to and approved by a Colorado magistrate judge. With the search warrant in hand, the Greeley Police Department searched Mr. Mink's home on December 12, 2003. The police confiscated various computer and other materials related to *The Howling Pig*. Ultimately, the District Attorney determined not to prosecute Mr. Mink for criminal libel.

Mr. Mink filed this lawsuit on January 8, 2004, alleging Ms. Knox violated his constitutional rights pursuant to 42 U.S.C. § 1983, as well as his statutory rights under the Privacy Protection Act, 42 U.S.C.

§ 2000aa, and the Electronic Communications Privacy Act, 18 U.S.C. § 2703. The operative complaint in this matter is Mr. Mink's First Amended and Supplemented Complaint dated February 19, 2004. App. 7a. Ms. Knox filed a Motion to Dismiss or in the Alternative for Summary Judgment on April 9, 2004. On October 26, 2004, United States Chief District Judge Lewis T. Babcock issued his Memorandum Order and Opinion granting Ms. Knox's Motion to Dismiss. App. 39a. The District Court concluded Mr. Mink failed to state any cognizable Privacy Protection Act or Electronic Communications Act claim. App. 46a & App. 57a. The District Court also held Ms. Knox was entitled to absolute immunity from Mr. Mink's 42 U.S.C. § 1983 Fourth Amendment claim because she acted in a quasi-judicial capacity when she reviewed and approved the search warrant affidavit for the Greeley Police Department. App. 51a. In pertinent part, the District Court reasoned:

> Ms. Knox's review of the warrant affidavit was a proximate (and commendable) precursor to the presentation of the affidavit before the magistrate, an undisputedly quasi-judicial activity. Had Ms. Knox herself presented the warrant affidavit to the magistrate after reviewing and approving it, all of her actions undoubtedly would have fallen within the immunity in ***Burns*** and ***Roberts***. I cannot see how her delegation of the latter task to a police officer affects her immunity for the former. It is not too much to presume that the police brought the affidavit to Ms. Knox for approval in her capacity as an "officer of the court." ***Pfeiffer***, 929 F.2d at 1490.

The rationale underlying absolute prosecutorial immunity counsels in favor of recognizing it in this case. The ***Imbler*** Court explained that the immunity of a prosecutor is based upon the same considerations that underlie the common-law judicial immunities that judges and grand jurors enjoy. ***Imbler***, 424 U.S. at 422-423. Subjecting prosecutors to liability for prosecuting unsuccessful cases would, the Court reasoned, undermine performance of the prosecutor's duties; the "public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." ***Imbler***, 424 U.S. 424-425. "Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." ***Imbler***, 424 U.S. at 425.

Police ought to be encouraged to bring warrant affidavits to prosecutors before entreating magistrates. Such a practice promotes reliability and judicial economy. Prosecutors are expected to be as knowledgeable as judges concerning the legal requirements of probable cause and are qualified to make the fundamentally judicial determination that an affidavit does or does not meet the legal standard. Prosecutors in such circumstances must, if the practice is to

produce just results, be immunized from suit for their decisions as are judges. And prosecutors ought not be discouraged from performing such reviews by the prospect of suit.

An additional consideration for the *Imbler* Court was the heightened difficulty an honest prosecutor would face in asserting a qualified immunity defense because in a vacuum, many decisions that a prosecutor makes can be perceived as constitutional deprivations. *Imbler*, 424 U.S. at 425-426. Qualifying a prosecutor's immunity "would prevent the vigorous and fearless performance of the prosecutor's duty to the proper functioning of the criminal justice system." *Imbler*, 424 U.S. at 427-428. Of course, when viewed in context, a prosecutor's advocacy for the state is often counterbalanced by the advocacy of the defense. If a prosecutor presents a witness of dubious credibility, for example, the defense is free to impeach that witness through cross-examination. That countervailing force is absent in this case. However, many adversarial acts of prosecutors—such as presenting evidence for search warrant applications, appearing before grand juries, and swearing out criminal complaints—meet no resistance from defense attorneys, but warrant absolute immunity nonetheless because they are essential to the efficient functioning of the criminal justice system.

> Ms. Knox cites to Colorado Revised Statutes Section 20-1-106.1 ("Immunity Act") as a basis of absolute immunity. As state law, the Immunity Act cannot immunize Ms. Knox from a 42 U.S.C. § 1983 claim. *See* ***Howlett v. Rose***, 496 U.S. 356, 376, 110 S. Ct. 2430, 110 L.Ed. 2d 332 (1990). However, in the absence of clear Federal law on the question, the Immunity Act provides a persuasive understanding of what constitutes a quasi-judicial act. It provides that, in the absence of bad faith, prosecutors "shall be immune from liability for the performance of" various "quasi-judicial" duties, including examination and evaluation of an affidavit for a search warrant "before such affidavit is submitted to a judge." Colo. Rev. Stat. § 20-1-106.1 (1 and 2). This rule is consistent with the ends outlined in ***Imbler.***
>
> Ms. Knox is absolutely immune from liability on the Third Claim.

App. 49a-51a. Judgment was entered by the District Court on October 27, 2004.

On November 24, 2004, Mr. Mink filed his Notice of Appeal to appeal the District Court's grant of the motions to dismiss in favor of all of the Defendants, including Ms. Knox. The United States Court of Appeals for the Tenth Circuit, in an Opinion dated April 16, 2007, reversed the District Court's grant of absolute immunity to Ms. Knox on Mr. Mink's 42 U.S.C. § 1983 Fourth Amendment claim. App. 1a.

REASONS FOR GRANTING THE PETITION

I. The United States Court Of Appeals For The Tenth Circuit's Decision Fails To Follow Decisions From The Court

The Court of Appeals' decision fails to follow decisions from the Court in two respects. First, the Court of Appeals' analytical approach is not faithful to this Court's functional approach for making absolute immunity decisions. The Court of Appeals, rather than analyzing the function of Ms. Knox's review and approval of the search warrant affidavit in the context of the applicable Colorado statute and the practice of the judicial district where she worked, instead narrowly focused on whether Ms. Knox's activities could be characterized as advocacy. The Court of Appeals' failure to follow a functional analysis and to analyze the purpose of Ms. Knox's activities against the background of the real world is inconsistent with this Court's prior approach. Second, the Court of Appeals' decision failed to evaluate Ms. Knox's actions based on the undisputed fact that her only action with respect to the search warrant affidavit was to conduct a review of it for its legal sufficiency from a Fourth Amendment probable cause perspective pursuant to Colorado law. The failure by the Court of Appeals to understand the importance of why Ms. Knox conducted the legal sufficiency review she did is also inconsistent with this Court's approach.

A. The Court of Appeals Decision Conflicts With Precedent From the Court in Concluding Chief Deputy District Attorney Knox's Review and Approval of the Search Warrant for its Probable Cause Sufficiency Was Not Undertaken in her Advocacy Role as an Officer of the Court

The Court of Appeals incorrectly determined Ms. Knox was not entitled to absolute immunity for her action of reviewing the sufficiency of the arrest warrant presented to her by the police for her review pursuant to Colorado law. Both the Court of Appeals' analysis and its holding are in conflict with prior decisions of this Court providing absolute immunity to prosecutors in their advocacy role and as officers of the court.

The starting place for any analysis of Ms. Knox's entitlement to absolute immunity should be this Court's decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976). There, this Court held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431. In *Imbler*, this Court at least hinted that a "functional approach" should be used in evaluating the activities of a prosecutor to determine whether absolute immunity applied. *Id.* at 430-431. Following *Imbler*, this Court has unambiguously adopted a functional approach to addressing absolute immunity issues. *See, e.g., Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993); *Forrester v. White*, 484 U.S. 219, 223-24 (1988); *Cleavinger v. Saxner*, 474 U.S. 193, 201-202 (1985).

The Court next addressed absolute immunity for prosecutors in *Burns v. Reed*, 500 U.S. 478 (1991). In

Burns, this Court addressed whether a state prosecuting attorney was absolutely immune from liability for damages in a 42 U.S.C. § 1983 case *inter alia* for participating in a probable cause hearing before a county court judge seeking to obtain a search warrant to search a criminal suspect's house and car. *Id.* at 481-482. The Court concluded the prosecutor's participation in the probable cause hearing where he examined a witness and successfully obtained a search warrant from the county court warranted absolute immunity. *Id.* at 487-492. In so doing, this Court noted that "the issuance of a search warrant is unquestionably a judicial act." *Id.* at 492 (citing *Stump v. Sparkman*, 435 U.S. 349, 363 n. 12 (1978)). Further, this Court also observed that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution." *Id.* at 492 (quoting *Imbler*, 424 U.S. at 431 n. 33). However, with respect to the search warrant, this Court carefully examined what was at issue and noted "[a]n examination of petitioner's complaint, the decisions by both the District Court and the Seventh Circuit, and the questions presented in the petition for a writ of certiorari in this Court reveals that petitioner has challenged only respondent's participation in the hearing, and not his motivation in seeking the search warrant *or his conduct outside of the courtroom related to the warrant*." *Id.* at 487 (emphasis and alteration added).[1] Thus, the issue presented in this case was expressly left open in *Burns*.

---

1. Indeed, the scope of what was at issue with the petitioner's claims in *Burns* was in dispute between this Court and the dissent. *Compare Burns*, 500 U.S. at 487-489 & n. 5 *with Burns*, 500 U.S. at 496-505 (Scalia, J. dissenting).

Following *Burns*, this Court in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), reaffirmed the principle that a prosecutor may be entitled to absolute immunity for activities preliminary to the actual initiation of a prosecution. In *Buckley*, this Court concluded:

> We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

Buckley, 509 U.S. at 273. Ultimately, in *Buckley*, the Court determined the prosecutors were not entitled to absolute immunity because their activities at issue in that case were investigatory in nature and did not relate to their professional role as advocates and officers of the court. *Buckley*, 509 U.S. at 274.

In *Kalina v. Fletcher*, 522 U.S. 118 (1997), whether a prosecutor was entitled to absolute immunity was again presented to this Court. In *Kalina*, the state prosecutor commenced a criminal proceeding by filing three documents with the state district court—an information, a motion for an arrest warrant, and Certification for Determination of Probable Cause. At issue in *Kalina*

was the prosecutor's completion of the Certification of Probable Cause because it included a sworn statement by the prosecutor herself vouching for the truth of the facts set forth in the certification as supporting probable cause. *Kalina*, 522 U.S. at 120-121. This Court concluded that the prosecutor's execution of the certification under penalty of perjury made her a complaining witness and not an advocate and therefore she was not entitled to absolute immunity. *Kalina*, 522 U.S. at 129-131. However, in reaching this conclusion, this Court's analysis in *Kalina* addressed a variety of issues of critical importance to any determination of Ms. Knox's absolute immunity in this case that were ignored by the Court of Appeals below.

Initially, the Court in *Kalina* made clear that the prosecutor's activities in evaluating the evidence to determine whether sufficient probable cause existed and even drafting the Certification of Probable Cause were conducted in her role as an advocate. *See Kalina*, 522 U.S. at 129 ("Indeed, except for her act in personally attesting to the truth of the averments in the certification, it seems equally clear that the preparation and filing of the third document in the package was part of the advocate's function as well."); *Kalina*, 522 U.S. at 130 ("indeed, even the selection of the particular facts to include in the certification to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of an advocate."). Review of *Kalina* unequivocally demonstrates it was the prosecutor's taking on the role of a witness by swearing to the facts contained in the Certification for Probable

Cause that rendered her actions not within the scope of her advocacy role as an officer of the court.

> Testifying about facts is the function of a witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required "Oath or affirmation" is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.

Kalina, 522 U.S. at 130-131.

Further, the Court in *Kalina* evaluated the prosecutor's absolute immunity in that case in the context of the legal requirements and practice of the prosecutors in her jurisdiction, as follows:

> Although the law required that document to be sworn or certified under penalty of perjury, neither federal nor state law made it necessary for the prosecutor to make that certification. In doing so, petitioner performed an act that any competent witness might have performed. Even if she may have been following a practice that was routinely employed by her colleagues and predecessors in King County, Washington, that practice is surely not prevalent in other parts of the country and is not even mandated by law in King County. Neither petitioner nor *amici* argue that prosecutors routinely follow the King

> County practice. Indeed, tradition, as well as the ethics of our profession, generally instruct counsel to avoid the risks associated with participating as both advocate and witness in the same proceeding.

Kalina, 522 U.S. at 129-130.

The Court of Appeals acknowledged this Court's cases cited above, but concluded that Ms. Knox's role in reviewing the search warrant affidavit and evaluating its probable cause sufficiency pursuant to her specific obligation under Colorado law did not involve advocacy, but instead "her function was to provide legal advice outside the courtroom to aid a nascent investigation." App. 36a. This analysis and conclusion by the Court of Appeals is fundamentally at odds with this Court's absolute immunity precedent.

First, the Court of Appeals, while paying lip service to this Court's functional approach to absolute immunity questions, actually analyzed Ms. Knox's entitlement to absolute immunity by determining whether her state-law mandated review of the search warrant affidavit constituted "advocacy" or "investigation." App. 34a-37a. The Court of Appeals' binary approach is inconsistent with this Court's long-standing functional approach. Fundamentally, the problem with the Court of Appeals' approach in this case is that Ms. Knox's review of the search warrant is not easily categorized as either "advocacy" or "investigation." The Court of Appeals' categorical approach drove its conclusion that Ms. Knox was not acting as an advocate in reviewing the search warrant affidavit so she must have been acting in an

investigatory capacity. The failure by the Court of Appeals to employ the type of nuanced functional approach adopted by this Court led the Court of Appeals astray in both its analysis and its conclusion. The proper approach to evaluating Ms. Knox's entitlement to absolute immunity in reviewing the search warrant affidavit is to focus on how her actions relate to the judicial process and whether her actions were uniquely delegated to prosecutors under Colorado law. *See, e.g.*, *Burns*, 500 U.S. at 495 ("Rather, as in *Imbler*, we inquire whether the prosecutor's actions are closely associated with the judicial process."); *Burns*, 500 U.S. at 494 ("Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct."; emphasis in original).

Applying a functional approach to Ms. Knox's action in reviewing the search warrant affidavit in this case pursuant to Colorado law prior to its submission to the magistrate judge demonstrates its close association with the judicial process. As the District Court recognized, "Ms. Knox's review of the warrant affidavit was a proximate (and commendable) precursor to the presentation of the affidavit before the magistrate, an undisputably quasi-judicial activity." App. 49a. Ms. Knox reviewed the search warrant affidavit not as part of any investigation in conjunction with the police, but instead as part of her role as a deputy district attorney to determine whether the facts presented in the search warrant affidavit met the Fourth Amendment probable

cause legal standard. Nothing about what Ms. Knox did was to assist the police in any investigatory activity. Instead, she provided a prior legal review of the search warrant affidavit in her role as a prosecutor and an officer of the court. No allegations have been raised that Ms. Knox had any involvement whatsoever in the gathering of evidence by the police or that she provided any legal advice to the police about their investigatory activities. "Nothing in the Amended Complaint indicates Ms. Knox discussed with police the advisability of searching the Mink residence or that she assisted the police in drafting the warrant in such a way as to increase the likelihood that the magistrate would find probable cause. Instead, the Plaintiffs allege only that Ms. Knox 'reviewed and approved the affidavit submitted to the state district court in support of the warrant to search the Minks' home.' Amended Complaint, 16." App. 47a-48a. As this excerpt from the District Court's opinion makes clear, in a fashion never rebutted by the Court of Appeals, Ms. Knox was not attempting to guide the police. Instead, she reviewed the search warrant affidavit to assist the court by screening it prior to its submission by the police. Again, the District Court's analysis of both the nature of Ms. Knox's role and the inherent utility of this type of pre-court review is worth quoting in full in this context:

> Police ought to be encouraged to bring warrant affidavits to prosecutors before entreating magistrates. Such a practice promotes reliability and judicial economy. Prosecutors are expected to be as knowledgeable as judges concerning the legal requirements of probable cause and are

> qualified to make the fundamentally judicial determination that an affidavit does or does not meet the legal standard. Prosecutors in such circumstances must, if the practice is to produce just results, be immunized from suit for their decisions as are judges. And prosecutors ought not be discouraged from performing such reviews by the prospect of suit.

App. 50a. The District Court's approach, not that of the Court of Appeals, appropriately analyzes the absolute immunity issue under the functional approach mandated by this Court.

Further, the Court of Appeals' analysis fails to account for the nature of Ms. Knox's review of the search warrant affidavit in terms of its sufficiency for meeting the legal standard for probable cause. Ms. Knox did not review the search warrant affidavit to determine its sufficiency in terms of its evidence or to evaluate the investigatory efforts of the police. Instead, and in sharp contrast, Ms. Knox reviewed the search warrant affidavit to determine if it met the legal requirements for probable cause. This type of exercise of the professional judgment of a prosecutor, as the District Court recognized, is all together different and demonstrates a close association with the judicial process itself. *See, e.g., Kalina*, 522 U.S. at 130 (noting that the prosecutor's "determination that the evidence was sufficiently strong to justify a probable-cause finding" was the work of an advocate).

Second, the Court of Appeals ignored how this Court's analysis in *Kalina* is germane to evaluating Ms.

Knox's actions as a function of Colorado law. It is undisputed that Ms. Knox reviewed the search warrant affidavit presented to her by the police because of the requirements of Colorado law found at C.R.S. § 20-1-106.1. Based on this statute, Ms. Knox was required as part of her official duties and responsibilities as a district attorney, to review any search warrant affidavits presented to her by law enforcement to determine whether they met the legal requirements of probable cause. It is significant that Ms. Knox's activities were pursuant to this specific Colorado statute. In *Kalina*, as quoted above, this Court specifically noted that the prosecutor's swearing of the facts in the Certification for Probable Cause was not required by any state or federal statute. *Kalina*, 522 U.S. at 129-130. This Court's reference to a potential statutory requirement demonstrates that the existence of the type of specific statutory requirement as C.R.S. § 20-1-106.1 presents a different circumstance than *Kalina*. Indeed, at least by implication, this Court's analysis in *Kalina* strongly suggests had the prosecutor in that case sworn the Certification for Probable Cause pursuant to a specific Washington statute she would have been entitled to absolute immunity. The Court of Appeals never considered this aspect of either *Kalina* or how Ms. Knox's activities pursuant to this Colorado statute differentiated this situation and made it subject to absolute immunity.

Instead, the Court of Appeals discounted the import of C.R.S. § 20-1-106.1 by suggesting that state law cannot create immunity for a federal 42 U.S.C. § 1983 claim. App. 37a. The Court of Appeals' analysis is perfunctory. Ms. Knox relies on C.R.S. § 20-1-106.1 to provide the

context for her actions and to demonstrate that under *Kalina* her actions in reviewing the search warrant affidavit pursuant to a specific requirement of Colorado law is qualitatively different than simply doing so at the instigation of the police. Indeed, as stated in Ms. Knox's affidavit filed with the District Court in support of her motion, Ms. Knox related she reviewed the search warrant affidavit in this case pursuant to the practice of the county and district judges in the judicial district who requested review of search warrant affidavits by the district attorney's office prior to their submission to a judge. Ms. Knox's actions pursuant to Colorado law and the explicit court-mandated practice of her judicial district makes this situation the equivalent of what this Court explained would be different in *Kalina*. The Court of Appeals' failure to analyze Ms. Knox's absolute immunity in these terms is inconsistent with *Kalina*.[2]

Under this Court's functional approach, in determining whether a prosecutor's actions are subject to absolute immunity, a court should ask whether the action is one that is normally undertaken by a prosecutor or by a police officer. Here, there can be no question,

---

2. Moreover, at least three prior members of this Court previously raised an analogous issue. *See Johnson v. Rex*, 474 U.S. 967, 967 (1985) (Burger, C.J., joined by Rehnquist and O'Connor, J.J., dissenting from denial of certiorari)

> Here the prosecutor was acting as an officer of the court in ensuring compliance with the *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)] requirements, and I would grant the petition for certiorari in order to define the applicability of absolute immunity in this context; surely the prosecutor's action was well within his function as a prosecutor and officer of the court.

particularly in light of C.R.S. § 20-1-106.1 and the explicit practice of the applicable judicial district, that the act of reviewing a search warrant affidavit for its legal sufficiency for probable cause prior to its submission to a judge is a uniquely prosecutorial role, and not one that is either normally performed, or even could be performed, by a police officer. Ms. Knox is therefore entitled to absolute immunity from any claim arising from her action in reviewing the search warrant, and the Court of Appeals' determination to the contrary is incorrect and must be reviewed by this Court.

II. The Proceeding Involves A Question Of Exceptional Importance, In That The Result, If Undisturbed, Will Lead To Significant Disruption For Prosecutors Throughout The United States For Defending Claims Pursuant To 42 U.S.C. § 1983 Because The Tenth Circuit's Decision Represents A Significant Erosion In The Protections Afforded By Absolute Immunity

As the Court has repeatedly and consistently recognized, important public policy reasons exist for affording prosecutors absolute immunity from subsequent civil suits related to their activities as a prosecutor. "These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423. Indeed, the Court has also recognized that the unique role of the prosecutor means that affording prosecutors only qualified immunity would be an inadequate protection for them from the threat and distraction inherent in

litigation challenging their prior prosecutorial decisions. *Imbler*, 424 U.S. at 425.

The policy concerns animating this Court's absolute immunity jurisprudence apply with equal force under these circumstances. Ms. Knox reviewed the search warrant affidavit pursuant to Colorado law and the explicit practice of the judges in the judicial district where she worked. The clear rationale behind both these statutory and judicial requirements were to have prosecutors review the search warrant affidavits as officers of the court to assist the court in its efforts to review warrant applications under the Fourth Amendment. Thus, the operations of the judiciary are unmistakably implicated by the process followed by Ms. Knox in this case. If absolute immunity is not afforded to Ms. Knox, prosecutors may not be willing to engage in this type of review and the judicial system will unnecessarily suffer as a result. As the District Court recognized in this case, the salutary purpose of the statutory review by prosecutors would be undermined by a conclusion that absolute immunity does not attach to this type of review of a search warrant affidavit by a prosecutor. Overall, the public policy benefit of having prosecutors review search warrant affidavits for their legal sufficiency under the Fourth Amendment outweighs the competing concerns of allowing disaffected persons who are the subject of such search warrants to sue the prosecutor. As the Court has recognized in this context, a variety of different other avenues exist for a disaffected person to seek relief from inappropriate prosecutorial actions. Here, the balance must be struck in favor of affording Ms. Knox absolute immunity from the Plaintiffs' 42 U.S.C. § 1983 claims for her action in reviewing the search warrant presented to her by the police pursuant to Colorado law

and the policy of the judicial district where she worked as a prosecutor. The Court should take this case to provide it with an opportunity to reaffirm the important absolute immunity principles present here.

CONCLUSION

In conclusion, for all of the foregoing reasons, Petitioner Susan Knox, a Chief Deputy District Attorney working for the 19th Judicial District Attorney's Office, in her individual capacity, respectfully requests this Court grant her Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

DAVID R. BROUGHAM
Counsel of Record
ANDREW D. RINGEL
HALL & EVANS, L.L.C.
1125 17th Street, Suite 600
Denver, CO 80202-2052
(303) 628-3300

Attorneys for Petitioner